Cases referred to:—

(1) *Foong Seong* v. *Chan San Choon* [1947] M.L.J. 85.
(2) *In re Powers* (1885) 30 Ch. D. 291, 296.
(3) *Dowse* v. *Gordon* [1891] A.C. 202.
(4) *In re Amalgamated Society of Rly. Servants (Parliamentary Fund Trusts). Addison* v. *Pilcher* [1910] 2 Ch. 547, 552.

ORIGINATING MOTION.

W. H. Sault for the plaintiffs.

Kaher Karam Singh for the defendants.

Ismail Khan J.: This is an application by the plaintiffs by an originating summons for a declaration that (1) they are the beneficial owners of all that piece of land situate at Ayer Panas in Malacca marked Lot No. 21 containing an area of 9 acres 3 roods 18 poles comprised in and held under statutory land grant No. 33015 dated 5th April, 1938; (2) an order for the transfer by the defendants of a half undivided share in the said land to the plaintiffs.

It is alleged by the plaintiffs that the defendants had sold them the whole of the said land but owing to a mistake only a half undivided share in the land was conveyed to them under the deed of conveyance. The defendants by their affidavit said that they sold only a half undivided share in the land as stated in the deed of conveyance and not the whole of the land.

Mr. Sault for the plaintiffs argued that as the defendants had sold the whole of the land but had conveyed only a half share thereof to the plaintiffs the defendants were the trustees of the remaining undivided share for the plaintiffs, and that he could avail himself of the procedure set out in Order 55 rule 3(1).

Mr. Karam Singh for the defendants objected that an originating summons is not the appropriate procedure for a case of this nature but did not cite any relevant authority. In this case the plaintiffs seek to establish a trust by the defendants in their favour as to the remaining half share in the land not conveyed by the deed of conveyance. This would depend on the question whether the defendants had agreed to sell the whole of the land as alleged by the plaintiffs or only a half share thereof to the plaintiffs as alleged by the defendants. This is purely a question of fact and, in my opinion, it would be contrary to all decided authorities to try disputed issues of fact on an originating summons — see *Foong Seong* v. *Chan San Choon*(1); *In Re Powers*(2); *Dowse* v. *Gordon*(3).

Mr. Sault says that the matter could also be dealt with under Order 54A rule 1. Order 54A rule 1 reads as follows:—

"Any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

I do not think that Order 54A rule 1 helps the plaintiffs because there is no question here of the construction of any deed. The deed of conveyance is clear. It says, according to the plaintiffs' affidavit, that only a half undivided share in the land was conveyed to the plaintiffs by the defendants. There can therefore be no question of any construction of the deed. The plaintiffs claim a declaration that they are the beneficial owners of the whole piece of land and a transfer by the defendants of the remaining half share in the land to them, but as Swinfen Eady J. said in *In Re Amalgamated Society of Railway Servants (Parliamentary Fund Trusts). Addison* v. *Pilcher*(4) at page 552 "but the declaration of the rights of the persons interested authorised by Order 54A rule 1 is intended to follow on the determination of the question of construction, and there is no question of construction here."

I should therefore stay the proceedings on this originating summons. The plaintiffs should they so desire to obtain the relief they seek ought to proceed by writ. The question of costs in these proceedings will be dealt with in the action.

Order accordingly.

Solicitors: *W. H. Sault; Kaher Singh & Karam.*

YAP KIM CHAN v. YAP SOW & ORS.

[A. C. J. (Ong J.) July 5, 1960]

[K. L. — Civil Appeal No. 5 of 1960]

Master and Servant — Wrongful dismissal — Complaint — Procedure in Commissioner's inquiry — Joinder of several complaints in one — Employment Ordinance, 1955, ss.70(a) and (b) and 72.

Section 72 of the Employment Ordinance, 1955, does not enable the Commissioner for Labour to confer on himself jurisdiction over persons who are not properly parties to proceedings before him. The object of the section is only to effect economy of effort and in paper in the Labour Department, if any labour Officer intends to exercise his discretion and permit the proceedings to be instituted by one complaint, he must at least record in his case book the names and addresses of the various complainants, that there appears to be a common cause of complaint, that one of them has the consent of the others to attend and act on behalf of and generally to represent the others, and that consequently he would permit this to be done under the provisions of section 72.

CIVIL APPEAL.

S. M. Yong for the appellant.

Respondents in person.

Ong J.: This is an appeal involving the construction of section 72 of the Employment Ordinance, 1955, which, I hope, may be of assistance to Labour Officers. The appeal is by an employer, who is a tapping contractor, against the decision of the Junior Assistant Commissioner for Labour, Selangor, given on December 31, 1959, whereby the appellant was ordered to pay to one Yap Sow (f) and 16 other rubber tappers formerly employed by him a total sum of $1,448.49, being wages due in varying amounts to each of them from October 1 to 10, 1959, together with one month's wages, in lieu of notice, for 13 of the 17 complainants, by reason of their wrongful dismissal.

The proceedings were instituted upon a complaint made on October 12, 1959, by one of the labourers, Yap Sow, who appeared in person before a Labour Officer and was by him examined on affirmation when her statement was recorded in his case book. The procedure up to this stage was in accordance with the provisions in paragraphs (a) and (b) of section 70 of the Employment Ordinance, 1955. There is nothing on the record showing that any of the 17 complainants, other than the said Yap Sow, appeared before the Labour Officer on October 12th.

The appellant was summoned and he duly attended at the inquiry which commenced on November 11, 1959. Only 4 of the complainants appeared, namely, Yap Sow, Lee Sui, Lim Kiew and Lee Lang. Although the employer clearly stated in his defence that the complainants stopped work of their own accord and that he never dismissed them, the Junior Assistant Commissioner who conducted the inquiry was content to leave the case of the complainants to stand or fall by the testimony of only one complainant, Yap Sow. None of the three others available was called as a witness, notwithstanding that it must have been clear, even at that stage, that the issue to be determined was one of fact, and that there would undoubtedly be two conflicting versions of the events which took place on October 10.

After the close of the complainants' case, the further hearing was adjourned to December 12, 1959. The appellant gave evidence, and called three witnesses, Yap Kim Mow, Tan Yew Choi and Lee Yoon Fook (f). The same four complainants attended at this session. Further hearing was again adjourned to December 31, 1959 for the conductor of Bristol Estate, one Xavier, to be called to produce his record of the quantity of latex brought in by each complainant. At the conclusion of this hearing the Junior Assistant Commissioner held that 13 of the complainants had been dismissed on October 10 without notice, except Lee Sui, Wong Nyuk Lan, Wong Moy and Chong Tow.

The appellant has raised several grounds of appeal. One is that the Labour Officer had no jurisdiction to decide the case as there was no proper application before him, or any "joint complaint" from the 16 other complainants for whom Yap Sow purported to act. The appellant's contention is that the Labour Officer had misconstrued section 72 of the Employment Ordinance in allowing Yap Sow to sue on behalf of the 16 others, as well, without first finding out whether those 16 desired to join in the complaint. In my opinion this is a valid objection, because I can find nothing on the record containing any reference to section 72, or even suggesting that the Labour Officer who recorded Yap Sow's statement on October 12, or the Junior Assistant Commissioner who held the inquiry, purported at any time to act under that section. Section 72 reads:

"Joinder of several complaints in one complaint.

72. Where it appears to the Commissioner in any proceedings under this Part that there are more labourers than one having a common cause for complaint against the same employer or person liable, it shall not be necessary for each such labourer to make a separate complaint under this Part, but the Commissioner may, if he thinks fit, permit one or more of them to make a complaint and to attend and act on behalf of and generally to represent the others, and the Commissioner may proceed to a decision on the joint complaint or complaints of each and all such labourers:

Provided that, where the Commissioner is of opinion that the interests of the employer or person liable are likely to be prejudiced by the non-attendance of any labourer, he shall require the personal attendance of such labourer.

Proceedings by a labourer against an employer are initiated by "a written statement of his complaint" which he "shall present" to the Commissioner, "or he shall in person make a statement to the Commissioner of his complaint". In the latter case "the Commissioner shall . . . examine the complaint on oath or affirmation and shall record the substance of the complainant's statement in his case book": (see paragraphs (a) and (b) of section 70). Since a complaint must be presented either in writing or in person, and no one else but Yap Sow appears to have made the complaint on October 12, I am decidedly of the opinion that Yap Sow had no authority whatsoever to act for anybody but herself and no Labour Officer can give her such authority. There is no evidence whatsoever that she was authorised by any of the other 16, and, even in the case of the other three persons, Lee Sui, Lim Kiew and Lee Lang, their mere attendance at the subsequent hearing, without anything more, is not sufficient to make them also parties to proceedings in which the original complainant was only Yap Sow. Section 72 does not enable the Commissioner for Labour to confer on himself jurisdiction over persons who are not properly parties to proceedings before him. The object of the section is only to effect economy of effort and in paper in the Labour Department. If any Labour Officer intends to exercise his discretion and permit the proceedings to be instituted by one complaint, he must at least record in his case book the names and addresses of the various complainants, that there appears to be a common cause of complaint, that one of them has the consent of the others to attend and act on behalf of and generally to represent the others, and that consequently he would permit this to be done under the provisions of section 72.

A simple example, out of the facts of this case itself, will illustrate why this is necessary. Assuming that some of the other sixteen, such as Wong Nyuk Lan, Wong Moy and Chong Tow, being dissatisfied with the voluntary efforts of Yap Sow on their behalf, were to take fresh proceedings against the appellant and claim their month's wages in lieu of notice, how can they be debarred from doing so by action taken by Yap Sow behind their back without any

scintilla of evidence that they knew of any adjudication on their claims?

This ground alone suffices to dispose of the appeal in so far as the complainants, other than Yap Sow, are concerned. The appeal is allowed and the order of the Junior Assistant Commissioner is therefore set aside as regards these 16 persons.

It remains to deal only with the respondent, Yap Sow. I do not propose to deal in extenso with the evidence in her case. The Junior Assistant Commissioner rejected the appellant's defence because of two supposed major discrepancies between the latter's evidence and that of two of his witnesses. I think the first discrepancy, where his kepala (D.W. 1) said he was not present when the complainants were alleged to have told the appellant that they were going to stop work, was of a trifling character. The kepala did in fact go to the appellant's house, about an hour after the event, and the mistake could very well have been an honest mistake on the part of the appellant. As to Tan Yew Choi (D.W. 2), he did not contradict the appellant; the person he contradicted was the kepala (D.W. 1), but in so doing, it must be observed that from Yap Sow's cross-examination her case was that D.W. 2 was present at the weighing shed (page 13). He was therefore worthless as a witness.

On the other hand I fail to understand why Lim Kiew and Lee Lang, who could have supported the evidence of Yap Sow, were not called to do so. They could have testified to the circumstances of the alleged dismissal at the latex shed. Lee Sui was not present, but those two were. Xavier, an independent witness, was also present and though he could and ought to have been examined as to what took place, he was not. Lee Yoon Fook (D.W. 3) tended to corroborate the appellant, but the Junior Assistant Commissioner ignored or overlooked her entirely. In my opinion the Junior Assistant Commissioner had misdirected himself on the material portions of the evidence and his judgment cannot stand.

I am less loath to reverse him on a question of fact because I think he has also overlooked a material point of law. The appellant clearly said that his kepala had no authority to dismiss tappers. If D.W. 2 purported to dismiss them at the latex shed he did so without authority. The tappers might not have known of this, but the principal is not liable for an act of his agent exceeding the scope of his authority. If the tappers took umbrage over the kepala's unwarranted action they should have gone to the appellant, as I believe they did. Unfortunately when the tappers met the appellant there must have been a serious misunderstanding which neither side chose to dispel. The appellant cannot be blamed for it. In the result I would also allow the appeal as to Yap Sow. The order of the Junior Assistant Commissioner is set aside. I order rehearing of Yap's claim before a different Labour Officer. I make no order as to costs.

Appeal allowed.

Solicitors: *S. M. Yong & Co.*

PUBLIC PROSECUTOR v. ABDUL SAMAD

[A. Cr. J. (Hepworth J.) July 30, 1960]

[Kuala Trengganu — Criminal Appeal No. 7 of 1960]

Road Traffic —
Notice of intended prosecution — Onus — Road Traffic Ordinance, 1958, ss.36(1) and 56 — Service of Notice by registered post.

In this case the respondent was charged with driving a motor car without care and attention, an offence under section 36(1) of the Road Traffic Ordinance. The Magistrate found that the facts warranted a conviction, but acquitted and discharged him on the ground that the prosecution failed to comply with the provisions of section 56. On appeal the prosecution pointed out that at no stage did the respondent or any of his witnesses state that he had not received a notice in writing of the intended prosecution within 14 days of the commission of the offence, or at any other time.

Held: as there was nothing to show in the evidence whether or not a notice had been sent to the respondent in due time, by virtue of the provisions of Proviso (ii) section 56 should be deemed to have been complied with.

Per Curiam: although Proviso (ii) to section 56 of the Road Traffic Ordinance, 1958, places the onus of showing that this section had not been complied with upon the person being prosecuted it is none the less important that the provisions of sub-section (b) of the section (in the vast majority of cases it will be the question of a notice and not of a summons) are strictly complied with by the Police not only as to specifying in the notice the nature of the alleged offence and the time and place where it is alleged to have been committed but also as to service of the notice either personally or by sending by registered post.

If service of the notice is to be effected by registered post, whether or not the defendant receives the notice within 14 days is immaterial. It is necessary, however, that in effecting service in this manner the Police should act reasonably.

Cases referred to:—

(1) *Sandland* v. *Neale* [1955] 3 All E.R. 571, 573; [1956] 1 Q.B. 241; [1955] 3 W.L.R. 689.
(2) *Milner* v. *Allen* [1933] 1 K.B. 689; [1933] All E.R. Rep. 734.
(3) *Venn* v. *Morgan* [1949] 2 All E.R. 562.
(4) *Pope* v. *Clarke* [1953] 2 All E.R. 704; [1953] 1 W.L.R. 1060.
(5) *Stanley* v. *Thomas* [1939] 2 K.B. 462; [1939] 2 All E.R. 636.
(6) *Holt* v. *Dyson* [1951] 1 K.B. 364; [1950] 2 All E.R. 840.

MAGISTRATE'S CRIMINAL APPEAL.

Abdul Aziz bin Mohamed Zain (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Hepworth J.: The respondent was charged with driving a motor car without due care and attention, an offence under section 36(1) of the Road Traffic Ordinance, 1958. The Magistrate after finding that the facts warranted a conviction as charged none the less acquitted and discharged the respondent on the ground that the Prosecution had failed to comply with the provisions of section 56 of the Ordinance.

From this order of acquittal the Public Prosecutor appealed on the ground that the onus of proving that Section 56 had not been complied with was upon the respondent by virtue of Proviso (ii) to that section, and that the respondent had failed to do so.